

HON'BLE THE CHIEF JUSTICE SRI G.S. SINGHVI
AND
HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY
Writ Appeal No.541 of 2007

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Between:

Manisha & Mulay (JV), Aurangabad

... Appellant

And

A. Krishna Reddy, Partner Incharge,
AKR-Coastal (JV), Hyderabad and others

... Respondents

Counsel for the appellant: Shri O. Manohar Reddy

Counsel for respondent No.1: Shri D. Prakash Reddy,
Senior Advocate assisted by
Shri S.R. Sanku, Advocate

Counsel for respondent Nos.2 to 5: Shri C.V. Mohan Reddy,
Advocate General assisted by
Government Pleader for
Irrigation and Command
Area Development

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::JUDGMENT::

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July 09, 2007

Per G.S. Singhvi, CJ

This appeal is directed against order dated 13.6.2007 passed by the learned Single Judge in Writ Petition No.6914 of 2007, whereby he quashed the decision of the State Government to permit Chief Engineer, FFC (SRSP) and SSP, Karimnagar (respondent No.3 herein) to open the tender of M/s.Manisha and Mulay (JV) (the appellant herein) and consider the same along with other bids.

The Facts:

The Superintending Engineer, SRSP, Circle No.1 (respondent No.4 herein) invited tenders through e-procurement platform for the work of formation of Earth Dam, construction of Spillway, Head Regulators on Left and Right Side, Lead Channels, High Level B.T. Road including construction of DLR Bridge, two irrigation canals on both sides including Distributory System up to water course level and other allied works including Investigation, Designing and Estimation of Mothe Vagu Reservoir Designing and Estimation of Mothe Vagu Reservoir with FRL + 318.00 M for storing live capacity of 0.965 TMC at MDDL + 313.500 near Mothe (Village), Ramadugu (Mandal), Karimnagar District. The last date for submission of 'online' tender was 20.11.2006. Later on, the same was extended to 5.12.2006. The date for price bid opening, which was originally fixed as 24.11.2006, was also changed to 11.12.2006.

In all, nine parties including the appellant and respondent No.1 submitted their bids. The price bids of eight parties were opened on 11.12.2006 and it was found that the bid given by respondent No.1 (Rs.79,02,47,000/-) was the lowest. The bid of the appellant was not opened on the ground that the scanned copy of the Bank Guarantee (BG) was not seen 'online'. On the next day i.e. 12.12.2006, the representative of the appellant submitted representation to respondent No.4 that its bid was competitive and there was no

justification to exclude the same from competition. He claimed that BG was also uploaded, but due to some reason, the same was not displayed 'online'. He pleaded that the hard copies of BG and Demand Draft (DD) had been submitted before opening the price bid and the details of BG i.e. the name of the bank, the number of instrument, the amount and the date of issue were displayed and the Earnest Money Deposit (EMD) documents i.e. file name and ZIP name and BG comprising of three pages was also displayed. Respondent No.4, vide letter No.SE/FFC-1/J/DB/AE2/534/2006/473/H, dated 14.12.2006 forwarded the representation of the appellant to respondent No.3, who, in turn, submitted the matter to the Commissionerate of Tenders comprising Commissioner, COT, Chief Engineer from Irrigation and Command Area Development, in addition, two Chief Engineers of Roads and Buildings Department. The Commissionerate of Tenders, after making a reference to C.1 India Private Limited (Website Managing Company) (respondent No.5 herein) and considering its opinion, recommended that the tender of the appellant be treated as qualified because there was no willful suppression of information to the Tender Notifying Authority. For the sake of convenient reference, the relevant extracts of the Minutes of the meeting of the Commissionerate of Tenders held on 07.02.2007 are reproduced below:

Minutes of the meeting of Commissionerate of Tenders held on 07.2.2007 in the chambers of Commissioner, C.O.T., 6th Floor, BRKR Bhavan, Hyderabad – 63.

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REPRESENTATIONS / PETITIONS RECEIVED

M/s.Manisha & Mullay (JV) have submitted a representation vide letter No.NIL, dt.12.12.2006 stating that due to some reason scanned copy

of the BG was not displayed. They have further stated that they have submitted very competitive offer and requested to kindly consider their case and open their bid.

The Chief Engineer requested to offer the comments on the plea of the agency to open the price bid in the absence of scanned copy of the BG in the unloaded documents.

The C1 India was requested vide letter, dt.20.12.2006 by COT to give report on the contention of petitioner that due to some problem scanned copy of BG was not displayed.

The C1 India Ltd., reported vide letter, dt.5.1.2007 that the copy of BG was not uploaded and the details of EMD are entered online. They further stated that the evaluating department can adopt its own methodology to evaluate the bid submitted by the bidder.

DISCUSSION & DECISION:

The above issue was taken up for discussion in the COT meeting held on 7.2.2007, the Members perused the CE's letter dt.15.12.2006, the representation of the firm, dt.12.12.2006, the letter addressed to C1 India Pvt. Ltd., and their reply and the Bid notice.

The Members after the detailed deliberations have collectively opined that the firm has furnished the details of EMD correctly on the website and submitted the hard copy of the BG which is tallying with the details uploaded. Further, the hard copies are submitted on 11.12.2006 well before the opening of Price bid.

The Members also opined that the tenders are called for under EPC-Category.II works which are not having technical bid evaluation and only Transaction fee and EMD are to be submitted for opening of the price bid.

The Members also decided to request the Chief Engineer to take decision in favour of the Government Exchequer. Members opined that the bidder M/s.Manisha and Mulay has uploaded the information through online and the hard copies are also submitted well before the price bid opening of tenders which equips the Dept., with the instrument of B.G.,

Hence, after thorough discussions, members opined that the tenders can be considered as qualified since it appears from the information furnished to Commissionerate of Tenders, that there is no willful suppression of information to the Tender Inviting Authority.

Sd/- xx	Sd/-xx	Sd/-xx	Sd/-xx
Chief Engineer,	Chief Engineer	Chief Engineer, Commissioner	
(R& B) & Member,	National Highways	Medium Irri-	C.O.T.
COT		(R&B) & Member	gation &
		COT	Member,
COT			

The recommendation made by the Commissionerate of Tenders was accepted by the State Government and vide letter dated 28.3.2007, Secretary to Government, Irrigation and Command Area Development (Major Irrigation-III) Department permitted respondent No.3 to open the tender of the appellant and consider the same along with price bids of the other tenderers.

Respondent No.1 challenged the decision of the State Government in Writ Petition No.6914 of 2007 by describing it as arbitrary and violative of the doctrine of equality. In the affidavit filed by respondent No.1, it was pleaded that the decision taken by respondent No.4 not to consider the price bid of the appellant was based on a correct interpretation of the terms and conditions of tender notice and the Commissionerate of Tenders committed a serious illegality by recommending for opening of price bid of the appellant. It was further pleaded that the opinion given by the Web Managing Company was conclusive of the fact that the appellant had not scanned the copy of BG before submitting its original to respondent No.4 and, therefore, its price bid cannot be considered with the bids of other tenderers.

The stand taken by respondent No.4 was that all the bidders had furnished hard copies of DD/BG towards EMD and transaction fee before opening the price bid on 11.12.2006; that scanned copies of BG/DDs of eight firms were seen 'online' and found to be correct with the original; that in the appellant's case, only scanned copy of DD towards transaction fee was seen 'online' and the scanned copy of the BG towards EMD was not visible; that the particulars of the BG were uploaded by the bidder on the internet e-procurement website and the same fully tallied with the original submitted by the appellant. Respondent No.4

referred to Clause 25 of General Terms and Conditions and pleaded that price bids of only such tenderers could be opened who uploaded the scanned copies of EMD and transaction fee and submitted the originals to the Superintending Engineer. He relied on Clauses 13.3 and 13.4 of ITB of Part A Volume I of tender document and averred that price bid of the appellant was not opened because its BG was not seen 'online'. Respondent No.4 then referred to the representation made on behalf of the appellant, recommendations made by the Commissionerate of Tenders and the decision of the State Government and pleaded that vide Memo dated 02.04.2007, Secretary, Irrigation Department had instructed him not to open the price bid till further orders of the government.

In a separate affidavit filed by him, Shri Pradeep B. Chavan, Director of the appellant claimed that the BG was uploaded, but due to some mistake, the scanned copy was not displayed. He further averred that the bank guarantee had been obtained well before the date of submission and opening of the price bid and all the documents had been submitted to respondent No.4 well within time.

The learned Single Judge made a reference to Clause 25 of the General Terms and Conditions and note appended thereto and held that even though the requirement of uploading the scanned copy of BG may appear to be technical, its importance cannot be undermined and failure of respondent No.4 (the appellant herein) to comply with this requirement merited rejection of its bid. The learned Single Judge interpreted the word 'invariably' appearing in Clause 25 of the General Terms and Conditions and concluded that the Commissionerate of Tenders and the government were not justified in directing consideration of the bid of respondent No.4 (the appellant herein). He accordingly quashed the decision contained in letter

dated 28.03.2007 and directed the official respondents to finalize the matter relating to award of contract on the basis of result of the opening of tender on 11.12.2006.

Shri O. Manohar Reddy argued that the appellant had uploaded the scanned copies of BG and DD before submitting hard copies to respondent No.4 and, therefore, the latter could not have ignored its bid merely on the ground that uploaded BG could not be seen 'online'. He further argued that the punitive clause contained in para 13.4.1 of the Special Conditions envisages rejection of the bid only in the event of failure of the bidder to furnish the original DD/BG before opening the price bid and the learned Single Judge gravely erred by holding that the decision of respondent No.4 not to open the price bid of the appellant was justified because of non-visibility of scanned copy of BG. Learned counsel emphasized that the appellant had furnished the details of EMD and DD on website and submitted original copies to respondent No.4 well before the date fixed for opening the price bid and argued that the Commissionerate of Tenders did not commit any illegality by recommending consideration of its price bid and the government rightly accepted the same.

Learned Government Pleader for Irrigation fairly stated that the appellant had submitted original DD/BG before opening the price bid and argued that the State Government did not commit any illegality by accepting the recommendations made by the Commissionerate of Tenders because the officers of the rank of Chief Engineers, who are experts in the field, had the benefit of considering the entire material including the opinion of the representative of M/s. C-1 India Tender Management Services. The learned Advocate General, who appeared on 03.07.2007, gave out that the State Government has finally decided to act on the recommendations made by the

Commissionerate of Tenders.

Shri D. Prakash Reddy, learned Senior Counsel appearing for respondent No.1 supported the order under challenge and argued that the learned Single Judge rightly rescinded the decision of the government to permit respondent No.3 to consider the appellant's price bid along with those given by other tenderers because the appellant had not uploaded the scanned copy of EMD before submitting the original to respondent No.4.

Shri Reddy laid considerable emphasis on para 25 (11) of the General Terms and Conditions and argued that the price bid of the appellant cannot be opened because it failed to upload scanned copy of BG. Learned Senior Counsel submitted that the appellant made a protest only after knowing the price bids of others and, therefore, the Commissionerate of Tenders and the government should not have accepted its plea for consideration of price bid. Shri Prakash Reddy then argued that in such competitive matters, representations made by the tenderers should not be accepted after opening the price bid, else, it will give rise to unhealthy competition and manipulations. He submitted that the possibility of manipulations by the appellant cannot be ruled out in such matter and, therefore, Commissionerate of Tenders should not have entertained its representation after opening the price bids. Learned Senior Counsel further submitted that the Commissionerate of Tenders committed a serious illegality by recommending consideration of the appellant's bid ignoring the fact that if the latter's offer is found to be the lowest, then respondent No.1 will be deprived of his right to compete for award of three medium size packages.

We have carefully scanned the entire record and given serious thought to the arguments of the learned counsel. For a

comprehensive appreciation of the issue arising in the appeal, it will be useful to take cognizance of the relevant terms and conditions of tender notice. The same read as under:

General Terms & Conditions

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25.2 : EMD Rs. 110 lakhs – to be paid in shape of unconditional and irrevocable Bank Guarantee in the standard format provided in the tender document in favour of Superintending Engineer I & CAD Department, SRSP-FFC Circle No.1, Dharoor Camp, Jagtial or in the shape of Demand draft in favour of Assistant Pay &Accounts Officer, SRSP, LMD Colony, Karimnagar to be valid for a period of six months from the date of bid submission. The DD/BG shall be obtained from any Government owned public sector bank or any scheduled commercial bank. Scanned copy DD/BG towards EMD may be uploaded with the bids and originals must be submitted to the Superintending Engineer through registered post/couriers/personally before opening of the price bid. Failure to furnish the original DD/BG before opening of price bid will entail rejection of bid and black listing.

11. Note:

(a) Any other condition regarding receipt of tenders in conventional method appearing in the tender documents may please be treated as not applicable.

b) The tenderers should invariably upload the scanned copies of EMD and transaction fee uploaded with the bids and originals must be submitted to the Superintending Engineer through registered post/ courier/personally before opening of the price bid. The price bid of only such tenderers will be opened.

Special Conditions:

26.1 The bidders are eligible for award of 3 medium size packages only in Irrigation Department of Government of Andhra Pradesh from 01.04.2006 onwards.

VOLUME-I

PART-A

(BID NOTICE)

... ..

The originals of the scanned copies must be submitted to the Superintending Engineer through registered post / courier / personally before Price Bid opening. The price bid of only such tenderers will be opened. Failure to furnish the original D.D./B.G. before opening of price bid

will entail rejection of bid and black listing.

Special Conditions:

1. The bidders are eligible for award of 3 medium size packages only in Irrigation Department of Government of Andhra Pradesh from 01.4.2006 on wards.
2. Bids will be opened in serial one after another as per packages indicated in serial numberwise as published in bid notices issued.
3. The moment of the bidder is found successful for further packages will not be opened.
4. Tenders with an excess of more than 5% over the internal benchmark value arrived by the Department shall be summarily rejected.
5. In respect of tenders beyond 25% less than internal benchmark arrived by the department, a Bank Guarantee (or) Demand Draft for the difference between the tendered amount and 75% of internal benchmark value should be furnished at the time of agreement as additional security deposit.
6. The e-procurement application is PKI enabled and supports the digital certificates issued by APTS, for signing the bids at the time of submission by contractor. The contractor has to procure digital certificates issued by APTS Ltd., Hyderabad as per the procedure. Digitally signed bids are to be submitted electronically through e-procurement, without which the tender will not be considered for opening the price bid.
7. The bidders intend to know the procedure of bid submission on e-procurement platform, suitable training will be given by M/s.C1 India Ltd., Khairtabad, Hyderabad.
8. Government reserves the right to alter any conditions.
9. In the process, if the works are stalled due to legal intervention or due to natural calamities, Government reserves the right not to pay any compensation.

Earnest Money Deposit & Transaction fee:

- 13.1. The Bidder shall furnish, Earnest Money Deposit of Rs.1.10 Crores (Rupees One Crore Ten Lakhs) at the time of bid submission.

The Earnest Money Deposit (EMD) calculated @ 2.5% of bid amount shall be paid at the time of concluding contract by the successful bidder. This EMD can be in the form of:

- a) a bank demand draft on any Government owned public sector bank or any scheduled commercial bank.
- b) An unconditional and irrevocable bank guarantee in

13.2.	...	...	...
13.3.	...	...	...

13.4. The price bid of only such tenderers will be opened. Failure to furnish the original D.D. / B.G. before opening of price bid will entail rejection of bid.

A conjoint reading of the above reproduced General and Special Conditions of the tender notice makes it clear that while laying emphasis on uploading of scanned copies of DD/BG, the competent authority made it explicitly clear that the bid will be rejected in the event of non-furnishing of original BG/DD before opening of the price bid. The use of the word 'invariably' and the expression 'the price bid of only such tenderer will be opened' in para 25.11 of General Terms and Conditions and paras 13.3 and 13.4.1 of Special Conditions do give an impression that uploading of the scanned copies of the BG and DD is necessary for consideration of the price bid, but non-compliance of this requirement does not carry with it the penalty of rejection, which is attracted in the event of non-furnishing of original DD/BG before opening of price bid. The penalty of blacklisting also gets attracted only in that eventuality. If the Tender Inviting Authority wanted the condition of uploading the scanned copy of DD/BG absolutely mandatory, then it would have specifically provided for rejection of the bid in the event of non-uploading of the scanned copy thereof. However, the fact of the matter is that failure of the tenderer to upload the scanned copies of

BG and DD before submitting the original thereof to the competent authority does not attract the penal clause, which gets attracted only if the tenderer fails to furnish the original DD/BG before opening of price bid. The plain language of para 25(2) of General Terms and Conditions and para 13.4.1 of Special Conditions makes it clear that the bid can be rejected and the bidder can be blacklisted only in the event of failure to furnish original DD/BG. This is how the officers comprising the Commissionerate of Tenders, who have frequent opportunity to examine such matters, understood the terms and conditions and recommended for consideration of the price bid of the appellant. Therefore, keeping in view the well recognized rule of interpretation that penal provision in statute/penal clause in a document should be strictly construed, we hold that respondent No.4 committed a serious illegality by excluding the price bid of the appellant from the field of consideration and the State Government rightly directed respondent No.3 to consider the bid of the appellant along with the bids of other tenderers. In this connection, we may usefully refer to the judgments of the Supreme Court in **Chandrakanth v. Tusharika Debi**^[1], **Modula India v. Kamakshya Singh Deo**^[2], **Sham Sunder v. State of Haryana**^[3], **J.K. Synthetics v. CTO**^[4], **Raptakos Brett & Co. Ltd. v. Ganesh Property**^[5], **NEPC Micon Ltd. v. Magma Leasing Ltd.**^[6], **Sakshi v. Union of India**^[7] and **CCE & Customs v. ITC Ltd.**^[8].

While the importance of uploading the scanned copies of DD and BG cannot be diluted, we cannot altogether overlook the fact that once the original of the scanned copies are furnished by the bidder,

the competent authority can always examine the 'online' tender and determine its eligibility and entitlement to participate in the award of contract. It may be that the condition of uploading the scanned copy was incorporated in order to avoid the possibility of manipulation by a cartel of bidders, but in a case like the present one, it is not possible to record our approval of the reasons assigned by the learned Single Judge that failure to upload the scanned copies of the BG entailed the penalty of rejection of the appellant's bid.

The argument of Shri Prakash Reddy that the appellant had deliberately chosen to make representation after opening of the price bids and, therefore, the Commissionerate of Tenders should not have accepted its grievance lacks merit. A careful reading of the Minutes of the meeting of the Commissionerate of Tenders shows that the officers, who possess specialized knowledge, had taken cognizance of the fact that the tenders were called under ABC category works, which are not having technical bid evaluation and only transaction fee and EMD are required to be submitted for opening of the price bid. The writ petitioner did not allege any mala fides or bias against the members of the Commissionerate of Tenders. Therefore, the opinion expressed by the expert body could not have been lightly discarded by the learned Single Judge for nullifying the decision of the State Government to permit respondent No.3 to consider the price bid of the appellant, which, as revealed to the Court, is less by almost Rs.5,30,00,000/- of the price offered by respondent No.1.

We also consider it apposite to observe that the power of judicial review of the State action in contractual and commercial matters is extremely limited. The Court can interfere in such matters if the action complained of is shown to be violative of the constitutional or mandatory statutory provisions or is vitiated due to mala fides or

patent arbitrariness. While examining such issues, the Court has to always bear in mind the larger public interest and exercise restraint if it is found that the annulment of the State action would be injurious to the larger public interest. In **Tata Cellular v. Union of India**^[9], the Supreme Court noticed large number of English judgments on the subject and held:

“The principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.”

Their Lordships of the Supreme Court then observed that judicial review is concerned with reviewing the decision making process and not the merits of the decision and held that the duty of the Court is to confine itself to the question of legality and not the merits or justification of the actual decision.

In **Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd.**^[10], the Supreme Court laid down the following proposition:

“Though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the court that in the matter of award of a contract power has been exercised for any collateral purpose. It is not within the

permissible limits of interference for a court of law, particularly when there has been no allegation of malice or ulterior motive and particularly when the court has not found any mala fides or favouritism in the grant of contract in favour of the successful bidder (in this case the appellant)”

In **Raunaq International Ltd. v. I.V.R. Construction Ltd.**^[11],

the Supreme Court laid down the following propositions:

“The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. These would be:

- 1) the price at which the other side is willing to do the work;
- 2) whether the goods or services offered are of the requisite specifications;
- 3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;
- 4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;
- 5) past experience of the tenderer and whether he has successfully completed similar work earlier;
- 6) time which will be taken to deliver the goods or services; and often
- 7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.”

In **Air India Ltd. v. Cochin International Airport Ltd.**^[12], the

Supreme Court reiterated that the Court should always keep the larger public interest in mind in order to decide whether its intervention is called for in contractual matters. The proposition laid down in that case reads as under:

“The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.” (underlining is ours)

In **Noble Resources Ltd. v. State of Orissa**^[13], the Supreme Court held that the Court can refuse to exercise its jurisdiction in contractual matters if it does not involve any public interest.

In **B.S.N.Joshi & Sons Ltd. v. Nair Coal Services Ltd.**^[14],

the Supreme Court reviewed large number of judicial precedents on the subject and laid down the following propositions:

“The following legal principles are applicable to the award of government contracts/tenders:

- i) The requirements in a tender notice can be classified into two categories: those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary to the main object to be achieved by the condition.
- ii) If there are essential tender conditions, the same must be adhered to. If a party fails and/or neglects to comply with the requisite conditions which were essential for consideration of its case by the employer, it cannot supply the details at a later stage or quote a lower rate upon ascertaining the rate quoted by others;
- iii) If there is no power of general relaxation of tender conditions, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully. Whether an employer has power of relaxation must be found out not only from the terms of the notice inviting tender but also the general practice prevailing in the past. Keeping in view a particular object, if in effect and substance it is found that the offer made by one of the bidders substantially satisfies the requirements of the conditions of notice inviting tender, the employer may be said to have a general power of relaxation in that behalf. Once such a power is exercised, one of the questions which would arise for consideration by the superior courts would be as to whether exercise of such power was fair, reasonable and bona fide. If the answer thereto is not in the negative, save and except for sufficient and cogent reasons, the writ courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction;
- iv) If there is no general power of relaxation of tender conditions, and if, however, a deviation is made in relation to all the parties in regard to any of such tender conditions, ordinarily again a power of relaxation may be held to be existing. The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender

contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

v) When a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

vi) The bidding contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

vii) Where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.

viii) As huge amounts of public money may be involved, a public sector undertaking in view of the principles of good corporate governance may accept such tenders which are economically beneficial to it.

ix) A contract need not be given to the lowest tenderer and the employer is the best judge therefore; the same ordinarily being within the employer's domain, court's interference in such matter should be minimal. The High Court's jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record. The employer concededly is not bound to accept a bid only because it is the lowest. It must take into consideration not only the viability but also the fact that the contractor would be able to discharge its contractual obligations. It must not forget the ground realities.

x) Law operating in the field is no longer res integra. The application of law, however, would depend upon the facts and circumstances of each case. The terms contained in the notice inviting tender may have to be construed differently having regard to the fact situation obtaining in each case. No hard-and-fast rule can be laid down therefor."

The proposition which can be culled out from the above noted judgments is that the courts possessing the power of judicial review should exercise restraint in interfering with the award of contract by the State and/or its agencies and instrumentalities. The element of public interest should always be kept in mind while examining the legality of the decision-making process and the courts should not readily infer arbitrariness in the exercise of discretion by the State authorities. The power of judicial review should be exercised only when it is shown that the action of the State authorities is wholly arbitrary malicious or violative of any provision of the Constitution or any law enacted by the competent legislature. If two interpretations of tender conditions are plausible, then the court must give due weightage to the views of the expert bodies and the State functionaries who have experience to deal with such matters.

Reverting to the case in hand, we find that as per the terms and conditions of tender document, the bid could be rejected only on one's failure to furnish the original DD/BG before opening of price bid and not on the ground of failure to upload the scanned copies of BG/DD. The appellant had furnished original DD/BG before opening of price bid. Therefore, the action of respondent No.4 to exclude the appellant's bid was totally unjustified. The Commissionerate of Tenders, which comprised of experts in the field, considered the entire matter including the opinion of respondent No.5 and recommended that the bid of the appellant deserves to be considered along with those given by the other tenderers. In our opinion, the State Government did not commit any illegality by accepting the recommendations of the Commissionerate of Tenders and the learned Single Judge was not justified in ordering cancellation of the

decision taken by the State Government.

In the result, the appeal is allowed. The order of the learned Single Judge is set aside. Respondent No.3 shall now consider the price bids of the parties and take appropriate decision. Keeping in view the fact that unwarranted delay caused due to this litigation may not cause further injury to public interest, we direct respondent No.3 to take appropriate decision within ten days from today.

G.S. SINGHVI, CJ

July 9, 2007

C.V. NAGARJUNA REDDY, J

Note: LR copy be marked.
(BO)

svs

[\[1\]](#) AIR 1958 SC 521

[\[2\]](#) (1988) 4 SCC 619

[\[3\]](#) (1989) 4 SCC 630

[\[4\]](#) (1994) 4 SCC 276

[\[5\]](#) (1998) 7 SCC 184

[\[6\]](#) (1999) 4 SCC 253

[\[7\]](#) (2004) 5 SCC 518

[\[8\]](#) (2007) 1 SCC 162

- [\[9\]](#) (1994) 6 SCC 651
- [\[10\]](#) (1997) 1 SCC 738
- [\[11\]](#) (1999) 1 SCC 492
- [\[12\]](#) (2000) 2 SCC 617
- [\[13\]](#) (2006) 10 SCC 236
- [\[14\]](#) (2006) 11 SCC 548